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NTSB Order No. EA-4921

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 30th day of October, 2001

Application of ROBERT C. PEACON for an award of attorney and expert consultant fees and related expenses under the Equal Access to Justice Act (EAJA).	Docket 267-EAJA-SE-13828

OPINION AND ORDER

Applicant has appealed from the written initial decision of Administrative Law Judge William A. Pope, II, issued on January 24, 2000.[1] The law judge denied applicant's request for a partial recovery of attorney fees and expenses related to Mr. Peacon's defense of an order of the Administrator suspending his airman certificate. He did so on finding that applicant did not qualify for recovery because he had not actually incurred any expenses in connection with these proceedings. We deny the

[1] The initial decision is attached.

appeal, and amplify the law judge's reasoning.

The Equal Access to Justice Act (EAJA) was intended, ultimately, to control governmental abuses. "The central objective of the EAJA … was to encourage relatively impecunious private parties to challenge unreasonable or oppressive governmental behavior by relieving such parties of the fear of incurring large litigation expenses." S.E.C. v. Comserv Corp., 908 F.2d 1407 (8th Cir. 1990). But, EAJA has many requirements, and certain prerequisites must be met. Key to our decision here, and among many other things, EAJA requires the government to pay certain attorney fees and costs only to "prevailing parties," and then, only if the government fails to establish that its position was "substantially justified" or that special circumstances would make an award unjust. 5 U.S.C. 504(a)(2). The statute also explicitly requires that costs must be "incurred" by the applicant to be recoverable. In this case, applicant satisfies, at most, only the first of these three requirements.

1. Prevailing party. "Prevailing" in this context does not require that applicant have prevailed on all issues -- only in a "significant and discrete portion of the proceeding." 49 C.F.R. 826.5. In this case, applicant was successful in obtaining a substantial reduction in the sought suspension period, and in having a number of the charges dismissed. The Administrator appears to concede that applicant could be a prevailing party, having obtained a reduced sanction, and having prevailed on three issues. We need not decide this question in view of our

conclusions below. Nevertheless, assuming solely for the purposes of discussion that applicant is a prevailing party, he appears to have contributed to his own difficulty by withholding information and ultimately misleading the FAA.[2] In such cases in the future, we may conclude that those special circumstances would make an EAJA award unjust. See also 49 C.F.R. 826.5(b) ("An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding"). In this case, it appears that, had applicant been forthright with investigators, at least one charge may never have been brought.

2. Substantially justified. "Substantially justified" has been interpreted to mean reasonable in both fact and law. Pierce v. Underwood, 487 U.S. 552 (1988). This standard is less stringent than that applied at the merits phase of the proceeding. Indeed, the Administrator's failure to prevail on the merits of an issue does not preclude a finding that her position was substantially justified under EAJA. Peterson v.

[2] Applicant was charged with a violation of 14 C.F.R. 91.413(a) in connection with the apparent lack of a timely equipment check on a transponder. The FAA investigator had reviewed aircraft records and interviewed applicant and the aircraft's owner in a search for information about the required check, and found no evidence one had been done. Unbeknownst to the Administrator, applicant apparently knew that a transponder check had been done, and when. Despite the issue being raised by the investigator and in the Letter of Investigation, applicant did not offer this information until well into the hearing, a year after the order of suspension was issued, and only when the law judge proposed to recess the hearing for further investigation of this issue. The Administrator, upon confirming applicant's information, immediately dismissed the charge. It is immaterial to us that the Administrator might have discovered this on her own after more research.

Administrator, NTSB Order No. EA-4490 (1996) at 6.

Applicant seeks recovery in connection with three charges that were dismissed. These charges had to do with whether the transponder check was done, whether the required life raft was onboard for the flight across the Atlantic, and whether a required VOR[3] check had been done.

The Administrator has demonstrated that she was substantially justified in bringing these charges and in pursuing them at the hearing. As noted earlier, the transponder charge in all likelihood would never have been brought had applicant earlier provided the FAA with the information he offered at the hearing. The charge regarding the allegedly missing life raft was decided by the law judge in favor of Mr. Peacon on credibility grounds; the FAA had the testimony of a percipient witness that there was no life raft, and aircraft records failed to indicate one. That the law judge rejected this evidence does not mean the FAA was not substantially justified in the charge. Martin v. Administrator, NTSB Order No. EA-4280 (1994). As to the VOR check, this again rested on credibility. Applicant claimed that he had performed the required check, and the law judge accepted his testimony. It was not unreasonable, however, for the FAA to have believed differently, as there were no log records to support applicant's claim, as there should have been, and in light of applicant's statements that he performed both the

[3] Very high frequency omnirange station.

transponder and VOR checks (when the transponder check required equipment to which applicant had no access, thus putting his credibility in doubt to the FAA inspector).

3. Incurring the fees. As noted above, the law judge decided this case based on a conclusion that applicant "incurred" no fee obligation and, therefore, was not someone the EAJA intended to compensate. He based this conclusion on the fact that applicant's attorney stated on a number of occasions that applicant had no liquid funds to pursue this matter and, that he, Mr. Huff, was funding the litigation for him out of friendship. (They had been friends since boyhood.) The law judge likened this situation to Application of Livingston, NTSB Order No. EA-4797 (1999).

As the parties recognize, there are two key precedents here: Livingston, and Application of Scott, NTSB Order No. EA-4472 (1996). We agree with the Administrator that this case is more like Livingston than Scott. However, to avoid further ambiguity regarding our intentions in Scott, and to ensure EAJA is properly applied, we are here clarifying Scott and, for the future, imposing certain procedural requirements for recovery in cases such as this.

When, in Scott, at 5, we said, "[w]e think it is eminently reasonable to assume that, were they aware of its availability, respondents and their attorneys/representatives would uniformly agree to contingent pay arrangements in appropriate circumstances," we were speaking in the context of the facts

there: that is, an arms-length transaction between respondent and his representative. In that context, a contingent fee arrangement seemed a logical choice and, in that case, respondent and his representative offered extensive evidence of its details (which were not one-sided). While it may well have been that Mr. Scott would have had this representation in any event -- he did promise to provide expert services to other airmen in return for the representation -– and absent a commitment to pay any EAJA fees collected, those were not the facts we assumed.

Here, we have somewhat different facts presented to us that lead us to different conclusions both in this case, and for the future. Here, it is clear that, regardless of the availability of EAJA recovery, Mr. Huff would have represented applicant, and footed the bill because of their personal relationship. He has said so. Thus, like the applicants in Livingston and Comserv, applicant had no true liability or obligation to repay his counsel, and he was not deterred from seeking review of the FAA's action due to any lack of funds.

Further, we believe this case demonstrates that our statement in Scott extends too far and could be read to vitiate the statutory requirement that an applicant have truly incurred expenses. We will not assume in every case that every party would enter a contingency agreement. We cannot find this consistent with EAJA, as EAJA does not require or intend that everyone who prevails will recover. The statute and case law explicitly require that costs must be "incurred" to be recovered,

not that the incurring of costs merely be assumed. There are more goals in EAJA than simply discouraging the government from bringing bad cases. As noted, it was intended to encourage representation for those who would otherwise be without it. Applicant is not such a person.[4]

Furthermore, we are concerned -- as clearly is the FAA -- that our policy in Scott could encourage misrepresentation and the creation of after-the-fact documentation to support a claimed contingent fee arrangement. In this case, applicant and counsel felt it necessary to present such a document to satisfy Scott. *In the future, to support a finding of an actual contingency arrangement, we will require written documentation created at the time counsel is hired.* Oral statements, under oath or not, will not suffice. Nor will written agreements entered after the fact. With the possibility of EAJA recovery well known to the administrative bar, it is not unreasonable to expect that parties be aware of our precedent at the time of going forward. Nor is it unreasonable to expect parties to enter written agreements evidencing their obligations to each other.

ACCORDINGLY, IT IS ORDERED THAT:

1. Applicant's appeal is denied; and

2. His EAJA application is dismissed.

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[4] Applicant also argues that our rules allow recovery even if services were made available without charge, citing 49 C.F.R. 826.6. We addressed this issue in Scott, at 8, and reiterate that reasoning here.

CARMODY, Vice Chairman, and HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order. BLAKEY, Chairman, did not participate.